

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

WILSON C.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL  
CENTER,

Service Agency.

OAH Case No. L 2006100297

**DECISION**

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on December 5, 2006, in Alhambra, California.

Claimant's father represented Claimant.

Jesse Valdez, Manager, represented Eastern Los Angeles Regional Center (Regional Center or Service Agency).

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

**ISSUE**

Whether Service Agency should fund the Listening Program and/or the Therapeutic Listening Program for Claimant.

**FACTUAL FINDINGS**

1. Claimant is a four-year-old Service Agency consumer by reason of his diagnosis of mental retardation (provisional). He resides with his biological parents and twin sister. He has been described by his parents as hyperactive and resistive, and depends on his parents for help with most of his daily tasks.

2. The mental retardation diagnosis was derived following a psychological evaluation by Larry E. Gaines, Ph.D., on July 29, 2005. It was a provisional diagnosis because of difficulties measuring Claimant's cognitive ability in light of his short attention span. Dr. Gaines recommended a reevaluation by age five. Dr. Gaines also diagnosed Claimant with "Mixed Receptive Expressive Language Disorder," "Developmental Coordination Disorder," and "Attention Deficit Hyperactivity Disorder, Combined (Rule Out)," but did not directly discuss whether Claimant has autism and did not specifically rule out the presence of the condition.

Dr. Gaines noted that Claimant showed loss of hearing in his right ear, particularly for quiet sounds. Claimant demonstrated mild deficits in language, sensory/motor functioning, adaptive behavior, and social functioning, as measured through the Vineland Adaptive Behavior Scales. Dr. Gaines concluded that Claimant would benefit from participation in special education, speech therapy, occupational therapy, physical education assistance, and behavior management interventions.

3. After an evaluation on May 15, 2005, a multidisciplinary team at Claimant's medical provider, Kaiser Permanente (Kaiser), diagnosed him with autism. In arriving at their diagnosis, the evaluators concluded that in the area of social interaction Claimant showed very poor eye contact, lacked of interest in or play with peers, displayed minimal interest in showing or sharing of interests, and demonstrated general aloofness and indifference to others. In the area of communication, they found, Claimant's language skills were severely delayed with evidence of regression; he engaged in high frequency, repetitive babbling; and he demonstrated no pretend or representational play. Claimant engaged in repetitive and perseverative behaviors, including spinning, staring at lights and reflections, and pushing buttons.

Kaiser recommended continuation of language therapy, with additional objectives on pragmatic social functions, such as greetings, consideration of combining sensory motor techniques and initiation of verbal skills, and occupational therapy input in a classroom setting to address visual motor and sensory processing concerns. The Kaiser evaluators stated their opinion that Claimant could benefit from a sensory integrative approach to address issues such as proprioceptive and vestibular processing. They also recommended referral to Service Agency for determination of eligibility and case management services and follow up by the Kaiser Autism Coordinator in three to six months.

4. Claimant attends a special preschool day class in the Garvey School District (District). He was first found eligible for special education services in October 2005, as a student with a speech and language impairment.

On November 3, 2006, the District conducted an evaluation to decide whether to change Claimant's eligibility basis. School psychologist Nancy Kugler (Kugler) reviewed existing

records, including the May 2006 Kaiser assessment, and completed the Autism Diagnostic Observation Schedule. She concluded that Claimant demonstrated impairments in social interaction (marked impairment in the use of nonverbal behaviors, including eye-to-eye gaze, body posture and gestures, marked impairment in seeking to share his own pleasure and interest with others, and a lack of social/emotional reciprocity), qualitative impairments in communications as manifested by language delay and by the lack of spontaneous age-appropriate play, and restrictive, repetitive and stereotyped patterns of behavior as manifested by a compulsive adherence to routines, all of which were consistent with autism.

On November 3, 2006, after review of the school psychologist's findings, Claimant's Individualized Education Plan team added the diagnosis of autism to the special education qualifying conditions. He receives occupational therapy, physical therapy, speech and language services, and adaptive physical education from the District.

5. The District funded occupational therapy following the assessment and recommendation by the Center for Developing Kids (CDK). CDK recommended weekly clinic-based services with an emphasis on sensory integration and neuromuscular development to serve as a foundation for improved classroom participation and peer interaction.

6. On or about August 22, 2006, psychologist Randi Elisa Bienstock, Ph.D. conducted a review of records on behalf of Service Agency, which records included the Kaiser May 2006 evaluation. Dr. Bienstock's conclusions, in their entirety, are: "(1) Based on the information obtained from the reports reviewed, the bulk of the evidence based on formal clinical observations and data, does not support a change in the diagnostic status to warrant the addition of Autism on Axis I at this time."

7. Claimant's parents have requested a therapeutic listening program because they believe it would help Claimant. His father has noticed that Claimant has become more withdrawn and less responsive to those around him. They submitted an article from the December 2005 issue of Autism and Asperger's Digest that indicates such programs may help autistic children improve sensory processing.

8. The programs sought by Claimant's parents use acoustically modified classical music to improve sensory perception in autistic individuals. The Listening Program requires special equipment and set of 8 discs, and costs approximately \$1,200. Kaiser will not fund the purchase, but Claimant's occupational therapist with the insurer, who is trained in the program, has agreed to supervise Claimant's participation.

9. Dr. Bienstock reviewed Claimant's request on September 5, 2006. She recommended against funding the program because it is a program to benefit autistic children and Claimant's "profile did not warrant a diagnosis of Autism." She also noted that "Other reports, including those that report consumer meets criteria for a diagnosis of Autism also did

not mention problems with auditory processing within the occupational and sensory processing sections.” Rather, she noted, the sensory deficits identified by the District manifest in the areas of hyper-responsiveness to movement activities, low tone, poor muscle strength, difficulty organizing, initiating and sequencing new tasks (praxis), and difficulty processing neuromuscular, sensory-based information. Lastly, she referred to Claimant’s mild hearing loss of the right ear and stated that “There is also no reported evidence to suggest that this program is appropriate for children with mild hearing deficits.”

10. By letter dated September 22, 2006, Service Agency declined the request for funding. It was noted that the program was intended to benefit autistic children and that the bulk of the evidence did not support a finding that Claimant was autistic. Claimant’s parents thereafter filed a timely fair hearing request.

11. In another “Psychologist Record Review” note, dated October 18, 2006, Dr. Bienstock repeated her conclusions set forth in factual finding numbers 6 and 9. In specific criticism of the Kaiser assessment she wrote: “However, there is no information with regard to previously identified symptoms related to ADHD-combined type and the differential diagnosis of Autism versus symptoms of ADHD. In addition, there was no indication of behaviors that would be consistent with [Claimant’s] developmental age and overall developmental profile.”

12. Dr. Bienstock reviewed the November 3, 2006, District report prepared by Kugler and entered the following note on November 21, 2006: “Based on the information obtained from the report reviewed, there is no additional information or any formal evidence such as formal testing measures including but not limited to the ADOS, GARS, CARS, ADIR to support any change in a diagnosis. Overall, a change in the diagnostic status to warrant the addition of Autism on Axis I, is not warranted at this time.”

### LEGAL CONCLUSIONS

1. In enacting the Lanterman Act, Welfare and Institutions Code section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code § 4501.)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code § 4620 et seq.) Thus, regional centers are responsible for developing and implementing individual program plans, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (Welf. & Inst. Code §§ 4646, 4646.5, 4647, and 4648.) The statute also places responsibility on regional centers for conducting appropriate and timely assessments. (Welf. & Inst. Code §§ 4642 and 4643.)

3. Welfare and Institutions Code section 4512, subdivision (b), defines the services and supports that may be funded, in pertinent part, as follows:

“Services and supports for persons with developmental disabilities means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer, or where appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.”

Thus, the statute requires regional centers to provide “specialized services and supports or special adaptations of generic services,” taking into account consumer needs and desires as well as cost-effectiveness.

4. Service Agency has refused to fund the listening therapy service primarily because it asserts that Claimant is not autistic. However, at least two independent sources, one involving a multi-disciplinary team, point toward a diagnosis of autism and Service Agency has not ruled out the existence of the condition through a valid assessment based on clinical best practices. Although Service Agency has criticized Kaiser’s and District’s assessments, these are the only clinical assessments that have specifically focused on whether Claimant has autism. They are also the more recent evaluations that have involved actual observation of Claimant. In these circumstances, funding for the therapeutic listening program may not be denied simply because Service Agency has not formally diagnosed Claimant as autistic.

5. The evidence regarding the general benefits of a therapeutic listening program for autistic children was not disputed at the hearing. In light of the autism diagnosis from Kaiser and the supporting test and observation results from the District, listening therapy is likely to benefit Claimant. Also, Kaiser and CDK each concluded that Claimant has sensory deficits that require attention and treatment. However, no specific evaluation has been performed regarding if or how the listening therapy programs can best meet Claimant’s needs, particularly in light of his hearing loss. Therefore, Service Agency shall have a three-month period to conduct such an assessment.

6. Service Agency shall fund the Listening Program or the Therapeutic Listening Program for Claimant, consistent with this Decision and the results of a timely and appropriate assessment consistent with this Decision, by reason of factual finding numbers 1 through 12 and

legal conclusion numbers 1 through 5.

### ORDER

1. Claimant's appeal is sustained.
2. Service Agency shall conduct a timely and appropriate assessment regarding whether and, if so, how, the Listening Program and/or the Therapeutic Listening Program can meet Claimant's needs, which assessment shall be completed no later than three months from the date this Decision is issued.
3. If the assessment indicates that the Listening Program and/or the Therapeutic Listening Program is/are appropriate to meet Claimant's needs, then an appropriate program chosen by Claimant's parents shall be funded.
4. If the assessment indicates that the Listening Program and/or the Therapeutic Listening Program are not appropriate to meet Claimant's needs, then Service Agency shall meet with Claimant's parents following the results of the assessment and jointly decide whether another program is necessary to meet the needs identified in this Decision and/or those identified in the assessment.
5. If Service Agency has not completed the assessment process after three months from the date this Decision is issued, then Service Agency shall fund the Listening Program or the Therapeutic Listening Program, as chosen by Claimant's parents.

Dated:\_\_\_\_\_

Samuel D. Reyes  
Administrative Law Judge  
Office of Administrative Hearings

### NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction

within 90 days.